

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION**

UNITED STATES OF AMERICA

VS.

JOSEPH ANTHONY DE LA GARZA

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§

NO. A-08-CR-442 JRN

**REPORT AND RECOMMENDATION
OF THE UNITED STATES MAGISTRATE JUDGE**

TO: THE HONORABLE JAMES R. NOWLIN
SENIOR UNITED STATES DISTRICT JUDGE

The undersigned submits this Report and Recommendation to the District Court pursuant to 28 U.S.C. § 636(b), 18 U.S.C. § 3401(i), and Rule 1(d) of Appendix C of the Local Court Rules of the United States District Court for the Western District of Texas, Local Rules for the Assignment of Duties to United States Magistrate Judges.

The Court conducted a hearing on February 3, 2011, and heard arguments from all of the parties with regard to the U.S. Probation Office's Petition seeking to revoke the Defendant's term of supervised release.

I. PROCEDURAL BACKGROUND

On April 28, 2009, the Defendant was sentenced to 27 months of imprisonment and three years of supervised release for being a felon in possession of a firearm, in violation of 18 U.S.C. § 922(g). The Defendant's term of supervision commenced on July 20, 2010, when the Defendant was released from the Bureau of Prisons.

The Defendant was arrested for felony DWI on December 3, 2010. During the traffic stop, the Defendant was uncooperative, and at one point re-entered his vehicle and attempted to drive away, prompting the arresting officer to draw his firearm and point it at the Defendant. Throughout

the stop the Defendant failed to follow the officer's instructions, and continually walked toward the officer in a provocative manner. To the officer's credit, he was able to eventually handcuff the Defendant without any altercation or injury. Video of the arrest, as well as the drive from the arrest scene to the jail, was introduced at the hearing. The audio of the drive to the jail reflects the Defendant cursing at and threatening the officer, and at one point, his children. A blood test was conducted, the results of which reflect that the Defendant's blood alcohol content was 0.34, or more than four times the legal limit of 0.08. Based on this arrest, the Probation Office submitted its Petition for Action, and a warrant for the Defendant's arrest was authorized by the undersigned on December 22, 2010. That warrant was executed the same day. The final hearing in the case was postponed twice, once at the request of the Defendant and once at the Government's request, in order for the evidence from the underlying charge to be available for the hearing.

On February 3, 2011, the Defendant and his attorney appeared before the undersigned Magistrate Judge for a hearing on the Petition. On the same date, the Defendant and his attorney signed a Consent to Allocution Before United States Magistrate Judge. Pursuant to 28 U.S.C. Section 636(a) and 18 U.S.C. § 3401(i), this Court held a Supervised Release Revocation Hearing, at which time the Defendant pled "NOT TRUE" to the violations alleged against him.

I. FINDINGS OF THE COURT

1. The Defendant was competent to stand trial on the charges against him, and had both a factual as well as a rational understanding of the proceedings against him.
2. The Defendant does not suffer from any physical or mental impairment that would affect his ability to fully understand the charge against him or the consequences of his plea.
3. The Defendant received a copy of the Petition naming him, and he read it.

4. The Defendant understood the Petition and the charges against him and had the opportunity to discuss the Petition and charges with his attorney.

5. The Defendant waived his preliminary hearing.

6. The Defendant voluntarily gave consent to allocute before a United States Magistrate Judge.

7. The Defendant violated conditions of his supervised release by: (1) committing the state law offense of driving while intoxicated; and (2) failing to abstain from the use of alcohol.

III. RECOMMENDATIONS

The Court has carefully considered all of the arguments and the evidence presented by the Government and the Defendant and RECOMMENDS, based on the original offense and the intervening conduct of the Defendant, that the Defendant's supervised release be REVOKED. The Court has taken into account the policy statements in Chapter Seven of the Sentencing Guidelines. The most serious violation is a Grade B, and the Defendant's criminal history category is II, resulting in an (advisory) guideline range of 6 to 12 months of imprisonment. Having considered all of the above, the undersigned RECOMMENDS that the Defendant be sentenced to 8 months of imprisonment, with 24 months of supervised release to follow. In addition to the conditions currently imposed on the Defendant, the Court FURTHER RECOMMENDS that the following additional conditions be imposed on the Defendant's 24-month term of supervised release:

1. Upon release from federal custody, the Defendant shall reside in and participate in a residential substance abuse treatment program as instructed by the Probation Officer. Participation in the program may include testing and examination to determine if the Defendant has reverted to the use of drugs or alcohol.

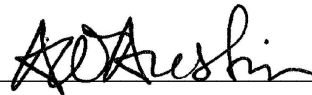
2. While in the residential substance abuse treatment program, the Defendant shall submit a release plan to the Probation Office for submission to the Court for review and approval.

IV. OBJECTIONS

In writing following the Court stating on the record its recommendation in this case, the parties waived the fourteen day period in which they may file of objections to this Report and Recommendation. *See* 28 U.S.C. § 636(b)(1)(C); *Thomas v. Arn*, 474 U.S. 140 (1985); *Douglas v. United Services' Automobile Ass'n*, 79 F.3d 1415 (5th Cir. 1996) (*en banc*). Accordingly, there will be no objections to this Report and Recommendation, and the matter is ripe for the District Court to act upon it.

To the extent that a party has not been served by the Clerk with this Report & Recommendation electronically pursuant to the CM/ECF procedures of this District, the Clerk is directed to mail such party a copy of this Report and Recommendation by certified mail, return receipt requested.

SIGNED this 8th day of February, 2011.

A handwritten signature in black ink, appearing to read "A. Austin", is written over a horizontal line.

ANDREW W. AUSTIN
UNITED STATES MAGISTRATE JUDGE